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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VALERIANO RACINES, Defendant and Appellant.	F076361 (Super. Ct. No. MCR054643) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Smith, J. and DeSantos, J.

INTRODUCTION

Appellant Valeriano Racines stands convicted of one count of violating Penal Code[1] section 288, subdivision (a), lewd and lascivious acts upon a child under the age of 14 years. Racines contends he received ineffective assistance of counsel because counsel did not request an instruction on voluntary intoxication. He also contends the section 1203.1h, subdivision (b) fee must be stricken. We will strike the fee and affirm the conviction.

FACTUAL AND PROCEDURAL SUMMARY

One evening in July 2016, Racines, Pablo Reyes, Jesse Perez, and C.[2] were gathered together in a motel, drinking beer. Silvestre's seven-year-old daughter was with them; she was watching television. Perez claimed he bought one 12-pack of beer, which all the men shared, and no one else bought any beer. Silvestre claimed there was not a lot of drinking and he was not drunk.

The minor testified that when she woke in the morning, she saw her father's friends standing in the room talking and drinking. Everyone went to Walmart that morning. When they drove to Walmart, Silvestre was in the middle of the back seat, Racines was in the back seat to Silvestre's right, and the minor was to Silvestre's left, behind the driver. After they arrived at Walmart, Perez and Reyes went inside the store. Silvestre was feeling nauseous and climbed out of the car; he went to look for a hat in the trunk. Racines was alone in the back seat with the minor for "a minute or two."

During a forensic interview of the minor, which was played for the jury, the minor stated that while her father was out of the vehicle, the man in back scooted to the middle of the back seat next to her, put his hand under her shorts, and rubbed her "pee-pee nee-

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[1] References to code sections are to the Penal Code.

[2] We use only the first initial of Silvestre's last name in order to protect the privacy of the victim.

nee" over her underwear. The minor described the man who touched her as having an oval face, short brown hair with a mustache and a small beard, and a tattoo and moles on his arms. She told the man to stop and he scooted back to his side of the vehicle. The minor identified Racines as the man who touched her from a photograph shown to her by law enforcement.

Later, when Silvestre heard about what had happened, he showed the minor a picture of Racines taken from Facebook. The minor identified Racines as the man who had touched her. She told her father the man had touched her and pointed to her "private area" and vagina.

A jury found Racines guilty of one count of lewd and lascivious conduct with a minor under the age of 14 years, in violation of section 288, subdivision (a).

Sentencing was held on September 25, 2017. The trial court noted Racines had a prior record of juvenile and adult convictions and his performance on juvenile probation was unsatisfactory based on the commission of new offenses. The trial court articulated that the offense was a serious felony pursuant to section 1192.7, subdivision (c)(6) and a violent felony pursuant to section 667.5, subdivision (c)(6).

The trial court imposed the upper term of eight years for the offense. Racines was ordered to comply with section 290 registration requirements. Various fines and fees were imposed, including a "fee equal to the cost of any medical examination conducted on the victim … to determine the extent of the assault pursuant to Penal Code section 1203.1h(b)."

The abstract of judgment was filed on September 26, 2017. Racines filed a notice of appeal.

DISCUSSION

Racines contends defense counsel rendered ineffective assistance because he did not request an instruction on voluntary intoxication as it related to his specific intent. We

disagree. He also contends the trial court erred in imposing the section 1203.1h, subdivision (b) fee and it must be stricken. The People concede this issue and we agree the fine must be stricken.

I. No Ineffective Assistance of Counsel

Racines contends defense counsel rendered ineffective assistance because he did not request an instruction on voluntary intoxication explaining to the jury that voluntary intoxication can negate the specific intent element of the charged offense. (See *People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Warner* (2006) 39 Cal.4th 548, 557.)

A defendant claiming he was denied his constitutional right to effective assistance of counsel must demonstrate that his lawyer's performance was deficient when measured by an objective standard of reasonableness and that the lawyer's errors were prejudicial. (*People v. Hernandez* (2012) 53 Cal.4th 1095, 1105.) We "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " (*Strickland v. Washington* (1984) 466 U.S. 668, 689.)

While there was uncontroverted evidence that Racines and others were drinking the night before and morning of the incident, the evidence is unclear as to how much alcohol was consumed by Racines and whether he was intoxicated. Racines claimed in an interview that he had been drinking heavily the night before; he did not remember going with others to Walmart the next day because he was "hung over" in the morning. Others claimed none of the four men drank "a lot" the night before or morning of the incident. Assuming *arguendo* the evidence would have supported a voluntary intoxication instruction, we analyze whether defense counsel rendered ineffective assistance by failing to request a voluntary intoxication instruction.

It is inappropriate for a reviewing court to speculate about the tactical bases for counsel's conduct at trial. When the reasons for counsel's actions are not readily apparent in the record, we will not assume constitutionally inadequate representation and reverse a conviction unless the appellate record discloses " ' "no conceivable tactical purpose." ' " (*People v. Lewis* (2001) 25 Cal.4th 610, 674–675.)

At trial, Racines put forth a defense that the alleged lewd and lascivious act never occurred; that the allegation was manufactured in the heat of a custody battle between the victim's parents. Any instruction to the jury that Racines committed the lewd and lascivious act but was not criminally responsible for his conduct because he was intoxicated would have been inconsistent with the defense. (*People v. Olivas* (2016) 248 Cal.App.4th 758, 771.) A lawyer is not constitutionally ineffective because he chooses one defense theory over another. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1005–1006.)

The tactical reason for not requesting a voluntary intoxication instruction is readily apparent. Had counsel requested the voluntary intoxication instruction, he would have been put in the unenviable position of having to argue that Racines did not commit the lewd and lascivious act, but alternatively, if he did, he was too intoxicated to have done so with the specific intent to arouse, appeal to, or gratify his or the child's "lust, passions, or sexual desires." (§ 288, subd. (a).)

Counsel decided to pursue an innocence defense rather than a voluntary intoxication defense. The decision not to present conflicting defenses is generally a wiser choice than pursuing a fallback defense. "The presentation of conflicting defenses is often tactically unwise because it tends to weaken counsel's credibility with the jury." (*People v. Jones* (1991) 53 Cal.3d 1115, 1138.)

We conclude defense counsel made a reasonable tactical choice and therefore rendered effective assistance of counsel. (*People v. Lewis*, *supra*, 25 Cal.4th at pp. 674-675.)

II. Section 1203.1h Fee

Racines was ordered to pay a fee equal to the cost of any medical examination conducted on the victim, pursuant to section 1203.1h, subdivision (b). No dollar amount was specified. Racines contends the fee must be stricken because the trial court failed to determine the amount of the fee and his ability to pay the fee. The People concede this issue.

Section 1203.1h, subdivision (b) provides, in relevant part, that the trial court may require a defendant to pay the cost of any medical examinations conducted on the victim. The trial court must determine that the defendant has the ability to pay all or a part of the cost of the medical examination before imposing a fee. Section 1203.1h, subdivision (b) requires a determination of the amount of the fee and the defendant's ability to pay at sentencing when the order is made. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 371–372.)

The record reflects that the trial court failed to specify a dollar amount and failed to make a determination of ability to pay. Therefore, the fee must be stricken.

DISPOSITION

The Penal Code section 1203.1h, subdivision (b) fee is stricken. In all other respects the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and disseminate it to the appropriate authorities.